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**RESPONSE OF THE GOVERNMENT
TO THE 15TH REPORT
OF THE STANDING JOINT COMMITTEE
ON REGULATIONS AND OTHER
STATUTORY INSTRUMENTS**

Application of Subsection 4(2) of the Indian Act

Presented by the
Honourable John C. Munro, P.C., M.P.,
Minister of Indian Affairs and Northern Development

OTTAWA, ONTARIO

SEPTEMBER 8, 1983



The Indian Act provides that the Governor in Council may declare that a portion of the Indian Act (except sections 37 to 41 which deal with the process whereby Bands surrender reserve lands to the Crown) shall not apply to any Indians or any group or Band of Indians. Certain portions of the Indian Act apply to Indian women upon their marriage to a non-Indian, so as to cause them to lose their status and related rights as Indians, as well as membership in their Band and to disentitle their children on birth to Indian status.

Other portions of the Indian Act which Band Councils have requested be declared not to apply to their Band result in the loss of status by Indian children when they reach twenty-one years of age, if they were born of marriages entered into after September 4, 1951, and both their mother and paternal grandmother were not Indian, ("double-mother" children).

The inequities which these portions of the Indian Act hold for Indian women, their offspring and "double-mother" children has been acknowledged by the

Federal Government. Additionally, International Conventions which the Federal Government has ratified require the elimination of discrimination based on sex.

In particular the relevant portions of the Indian Act result in the following:

- (1) S.11(1)(d) would disentitle the registration of the legitimate child of a female status Indian, even if the mother were to retain her status on marriage to a non-Indian through a proclamation which declared that S.12(1)(b) would not apply to female Indians of her Band.
- (2) S.12(1)(a)(iv) an Indian born of a marriage after September 4, 1951 whose mother and paternal grandmother were not status Indians at birth, lose their status at twenty-one years of age ("double-mother" children).

(3) S.12(1)(b) an Indian woman who marries a non-Indian loses her Indian status.

(4) S.14 an Indian woman loses membership in her Band if she marries a non-Indian.

In order to alleviate these inequities the Minister of Indian Affairs and Northern Development recommended that the Governor-in-Council invoke the powers of subsection 4(2) of the Indian Act. The use of subsection 4(2) of the Indian Act was recommended to declare inapplicable to certain Bands portions of the Indian Act which those Bands, through their Band Councils, requested not apply to them.

SUMMARY OF GOVERNMENT'S POSITION IN REPLY TO THE
COMMITTEE'S FIFTEENTH REPORT

It is the Government's position that:

1. The Governor in Council has the authority to declare portions of the Indian Act not to apply to Bands and the discriminatory provisions of the

Indian Act set out above are portions of the Indian Act which may be declared not to apply by proclamation under subsection 4(2).

2. It is not the use of subsection 4(2) but the subsection itself which is unusual. However, its wording is very broad, and by clear language is only not capable of being used with respect to sections 37 to 41 of the Indian Act.
3. Any use of subsection 4(2) of the Indian Act alters in some manner the relationship of Indians, who may be the subject of a proclamation, to the statutory scheme under the Indian Act. It therefore is not unexpected that subsection 4(2) could be used to declare that portions of the Indian Act relating to membership not apply to certain Bands, with the result that certain persons who are Indians or would be Indians at birth do not lose their status.

4. The discriminatory portions of the Indian Act can be declared not to apply to a Band while still maintaining a logical interpretation to the membership provisions of the Indian Act. Section 11, stating the qualifications for registration as an Indian, and section 12, stating circumstances under which status is lost, are still consistent. The words "subject to section 12" in section 11 must be read in the context of the clear language of subsection 4(2), which allows proclamations in respect of portions of the Act (except sections 37-41).
5. The making of a proclamation does not result in Indian status being conferred upon persons who do not have the same measure of Indian ancestry as others specifically entitled to status, but ensures the continuation of Indian status to those Indian women and Indian children who would otherwise be deprived of status through portions of the Indian Act which are discriminatory.

6. In the absence of a judicial decision which would prohibit the use of subsection 4(2) to declare inapplicable to Bands those portions of the Indian Act which discriminate against Indian women and Indian children, the Government has done all that is possible to ensure that its actions are within statutory authority and that it has acted responsibly in acceding to the request for change from Band Councils.
7. As a matter of law, the Minister of Indian Affairs and Northern Development may recommend to the Governor in Council that a proclamation be issued to declare that such portions of the Indian Act not apply to the Bands of petitioning Band Councils, in response to requests by Band Councils. It is the Government's policy to be as responsive as possible to the requests of Band Councils to remove the aspects of the Indian Act that discriminate on the basis of sex, pending the presentation of legislation to amend the Indian Act itself for this purpose.

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